SUPREME COURT, U.S.
FILED

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MARTIN F. MORGAN

Petitioner

VS.

TEXAS UTILITIES ELECTRIC COMPANY

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 14, 1997

45 pp

QUESTION PRESENTED

1. Does the burden shifting test set out in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993) permit the trial court to draw inferences favorable to the moving party from conflicting testimony and grant summary judgment even though a trial by jury has been requested?

LIST OF PARTIES

Petitioner

Martin F. Morgan

Respondent

Texas Utilities Electric Company

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 3

JURISDICTION 3

STATUTES INVOLVED IN THIS CASE 5

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THIS WRIT

1. In order to grant summary judgment for Texas Utilities and deny Morgan a jury trial, the district court had to draw inferences favorable to Texas Utilities from conflicting testimony. The making of such inferences by the court should not be permitted in a summary judgment case, since the jury, as trier of fact, should be allowed to determine the inferences to be drawn. Particularly, the trial court's conclusion that the reference back to Morgan's prior sexual harassment complaint at the time of his termination by Horace Riley would support a conclusion that Riley was taking "some perverse pleasure in seeing

Morgan being the target of a discrimination type complaint" but would not support an inference that Riley had a racial motivation in terminating Morgan amounts to an impermissible fact finding by the trial court. This usurpation of the role of the jury cannot be justified under the burden shifting test set out in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993). Since the district court and the Fifth Circuit erred in using the *St. Mary's* test to justify summary judgment, this writ should be granted so that the error may be corrected 10-11

CONCLUSION 10

APPENDIX A-1

TABLE OF AUTHORITIES

	Page
Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 956 (Fifth Cir. 1993).	10,12
Johnson v. J.C. Penny Company, Inc., 876 F.Sup. 135, 139 (N.Dist.Tx. 1995).	12
St. Mary's Honor Center v. Hicks, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993). .	i,9,10,16
Waggoner v. City of Garland, 987 F.2d 1160 (Fifth Cir. 1993)	10,12
Statutes:	
28 U.S.C. §1254(1)	3
42 U.S.C. 2000e-2(a)(1)(2)	4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MARTIN F. MORGAN

Petitioner

VS.

TEXAS UTILITIES ELECTRIC COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner hereby prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that court's per curiam opinion of December 26, 1996 affirming the trial court's Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment and the Final Judgment of the

district court dated May 16, 1996.

OPINIONS BELOW

The per curium opinion of the Fifth Circuit Court of Appeals dated December 26, 1996 is reproduced in the Appendix at page A-19.

The Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment and the Final Judgment of the district court signed on May 16, 1996 is reproduced beginning at page A-1 of the Appendix.

JURISDICTION

The United States District Court for the Northern District of Texas issued its Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment and signed its Final Judgment on May 16, 1996.[1] The United States Court of Appeals for the Fifth Circuit affirmed the district court's per curium by order

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[1]Appendix, page A-1; A-17

dated December 26, 1996.[2]

Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1), since this petition is being filed within ninety (90) days of the final order of the Fifth Circuit as provided by Sup.Ct. R. 13. The Fifth Circuit ordered that its opinion not be published.

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[2]Appendix, page A-19

STATUTES INVOLVED

42 USC 2000e-2(a)(1)(2) provides as follows:

> (a) Employer practices. It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This is a Title VII case based on race discrimination filed by the Plaintiff, Martin F. Morgan, after he was terminated from his job as senior engineering analyst at Texas Utilities. Morgan is a black man married to a white woman. Two different white female workers accused Morgan of sexually harassing them. One of them said he had exposed himself to her in a rest room about four (4) years before the date of his termination. Morgan denied the charges, but Texas Utilities used the allegations as a basis for terminating him. Texas Utilities moved for summary judgment, relying on the self-serving affidavits of its own personnel and deposition testimony. Morgan filed opposing deposition testimony and affidavits.

In his affidavits and deposition

testimony, Morgan strongly contested that he had been guilty of any sexual harassment. He denied that he had exposed himself to a female employee in a rest room four (4) years prior to the date of his termination.

One of the workers accusing Morgan of sexual harassment had seen pictures of Morgan's wife and said her father would roll over in his grave if she married a black man. Morgan's affidavits and deposition testimony indicated an atmosphere of racial hostility and tension in the work place marked by racist remarks from various Texas Utilities supervisory personnel.

Several years prior to his termination, Morgan had made a complaint against two male white workers for racist remarks that they had made to him. When the two female workers alleged that Morgan had sexually harassed them,

Morgan's supervisor, Horace Riley, talked as though it were an established fact that he had done it, and started laughing. He told plaintiff he was going to fire someone and said words to the effect "now the shoe is on the other foot" referring to the fact that Morgan had made the racial harassment complaint against the white male workers earlier. Horace Riley participated in the decision to fire the plaintiff and was the person who actually terminated him.

In granting the defendant's motion for summary judgment, the district court concluded that the evidence raised by the plaintiff would support a finding that he was not guilty of sexual harassment and had demonstrated a prima facie case of racial discrimination. However, the district court concluded that the fact there was evidence from which a trier of fact could have concluded that plaintiff

did engage in sexual harassment provided a legitimate non-discriminatory reason for his termination, and that the plaintiff had failed to raise an issue as to whether or not the employees of the defendant who terminated the plaintiff had a racial motivation in doing so. For these reasons, the district court granted summary judgment for the defendant. Petitioner appealed the decision to the United States Court of Appeals for the Fifth Circuit, which affirmed the district court's judgment per curium.[3]

Petitioner presents this Petition for Writ of Certiorari within ninety (90) days of the final action of the Fifth Circuit Court of Appeals in affirming the district court's final judgment.

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[3]Appendix, pages A-1; A-19

REASONS FOR GRANTING THE WRIT

I. In order to grant summary judgment for Texas Utilities and deny Morgan a jury trial, the district court had to draw inferences favorable to Texas Utilities from conflicting testimony. The making of such inferences by the court should not be permitted in a summary judgment case, since the jury, as trier of fact, should be allowed to determine the inferences to be drawn. Particularly, the trial court's conclusion that the reference back to Morgan's prior sexual harassment complaint at the time of his termination by Horace Riley would support a conclusion that Riley was taking "some perverse pleasure in seeing Morgan being the target of a discrimination type complaint" but would not support an inference that Riley had a racial motivation in terminating Morgan amounts to an impermissible fact finding by the trial court. This usurpation of the role of the jury cannot be justified under the burden shifting test set out in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993). Since the district court and the Fifth Circuit erred in using the *St. Mary's* test to justify summary judgment, this writ should be granted so that the error may

be corrected.

As the Fifth Circuit has recognized, summary judgments are appropriate only if there is no genuine issue of fact and the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *Waggoner v. City of Garland*, 987 F.2d 1160 (Fifth Cir. 1993); *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 956 (Fifth Cir. 1993). Using the analysis in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993), held by the Fifth Circuit to apply to summary judgments involving civil rights causes of action in *Bodenheimer v. PPG Industries, Inc.*, supra, the district court held that Morgan did meet his burden of establishing a prima facie case, so that the burden of production shifted to Texas Utilities to produce evidence of a legitimate, non-discriminatory reason for

the adverse employment action. The court held that the defendant did produce evidence of such a reason so that, in order to overcome summary judgment, the plaintiff had to demonstrate that Texas Utilities' offered reason was a pretext for racial discrimination. The district court granted summary judgment on the basis that Morgan failed to carry that burden. Morgan was accused of violating the work rule against sexual harassment. He stated unequivocally in his controverting affidavit and through his deposition testimony that he did not violate that work rule. The jury, as trier of fact, could chose to believe Morgan against the two accusing witnesses, so there is certainly a fact issue as to whether or not he violated the work rule against sexual harassment.

The district court held that Morgan

had failed to demonstrate that the people at Texas Utilities responsible for terminating him actually did not believe his accusers or that the sexual harassment complaint was not the real reason for his discharge, citing *Waggoner v. City of Garland*, 987 F.2d. 1160, 1165 (Fifth Cir. 1993) as cited in *Johnson v. J.C. Penny Company, Inc.*, 876 F.Sup. 135, 139 (N.Dist.Tx. 1995).

The Fifth Circuit had previously recognized in *Bodenheimer v. PPG Industries, Inc.*, supra, the difficulties involved in granting a summary judgment where the state of mind of the defendant is in issue. *Bodenheimer* , 959. Nevertheless, in *Waggoner*, the Fifth Circuit did hold that the granting of a summary judgment may be appropriate in such cases.

Morgan introduced a substantial amount of testimony indicating an

atmosphere of racial tension and bias against black people by Texas Utilities management. The evidence also shows that he had previously made a complaint of racial harassment against two male white workers several years earlier, and that Horace Riley, his supervisor, had sustained his complaint.

Horace Riley referred back to that charge at the time that he terminated Morgan. Plaintiff described the exchange between him and Riley in his controverting affidavit as follows:

> Several years prior to my termination (in 1988), I had made a complaint against two other individuals who had made racist remarks toward me. This complaint was made to Horace Riley, and he did take action against them. When this charge was made against me for supposedly harassing Bernadette Herriage and someone else, Horace Riley made reference to my previous complaints of racial harassment and told me that the shoe was on the other foot now, referring to the charges against me.

In his deposition, Plaintiff testified as follows:

> And I told him the whole story. And he looks at me, and he started laughing in the meeting. And he said, Martin, you know one thing? He said, I don't even care about that. And he said, I am going to fire somebody.
>
> And he says - what else did he say? Oh, he says, Martin, now the shoe is on the other foot; and let's see how you like it, is the statement he said.
>
> Q. What do you think he meant by that?
>
> A. Well, he had complained about people being racist to us. Now, this was a sexual harassment deal. Now it was my turn to get it. So he made that statement, now the shoe is on the other foot.

Riley was asked on his deposition whether he had ever made a statement like that and denied doing so. Taken in the light most favorable to plaintiff, this testimony would support an inference that Horace Riley had a racial dislike of Morgan, resented the fact that Morgan had

made racial discrimination complaints, resented the fact that he was married to a white woman, tolerated an atmosphere of racial hostility in the area under his control, and decided to terminate Morgan at the very first meeting he had with him about the sexual harassment complaints, before there had even been any discussion of the merits of those charges.

However, the district court engaged in a contrary inference:

> Morgan further testified that when Riley first spoke to him about the sexual harassment complaint against him, Riley said to Morgan 'now the shoe is on the other foot let's see how you like it'
>
> Morgan believes that this evidences the fact that his previous complaints were on Riley's mind when Morgan was terminated. Even so, however, the court fails to see how this constitutes evidence that TUEC's reason for terminating Morgan was a pretext *for racial discrimination*. At most, this comment would support a conclusion that Riley was taking some perverse pleasure in seeing

> Morgan be the target of a discrimination type complaint, not that he wanted to get rid of Morgan because of his race. Although Riley may have had a ulterior motive for voting to terminate Morgan's employment, Morgan cannot prevail unless that ulterior motive was on account of Morgan's race.[4]

This statement by the court amounts to the court's assumption of a fact finding role at the summary judgment level which is improper, and cannot be justified under this Court's burden shifting analysis in *St. Mary's Honor Center v. Hicks*, supra.

Morgan had made a demand for jury trial, and the action of the district court in granting summary judgment effectively deprived him of his right to a trial by jury. Because of the conflicts in the testimony that have been pointed out, and the fact that the testimony in Morgan's favor should be

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[4]Appendix, pages A-15

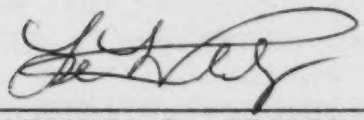
taken as true at the summary judgment level, while the self-serving declarations of Texas Utilities must be taken as false to the extent that they conflict with the evidence favoring Morgan, it was inappropriate for the district court to grant summary judgment in this case.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the per curiam affirmance by the Fifth Circuit of the district court's summary judgment. Petitioner further prays that, upon the granting of the petition, the actions of the Fifth Circuit and the district court be reversed and that this cause be remanded to the United States District Court for the Northern District of Texas

for a new trial.

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARTIN F. MORGAN	§	
	§	
VS.	§	ACTION NO.
	§	4:94-CV-453-Y
	§	
TEXAS UTILITIES	§	
ELECTRIC COMPANY	§	

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pending before the Court is Defendant Texas Utilities Electric Company's Motion for Summary Judgment, which was filed in the above-styled and numbered cause on May 26, 1995. Plaintiff Martin F. Morgan ("Morgan") filed a response in opposition to the motion on June 30, and defendant Texas Utilities Electric Company ("TUEC") filed a reply to the response on July 14. After consideration of the foregoing and the applicable law, the Court finds that TUEC's motion should be granted.

Morgan claims that he was discharged

from his employment at TUEC in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*[1] Specifically, Morgan, who is black, claims that TUEC discriminated against him on the basis of his race when it terminated his employment allegedly due to Morgan's violation of TUEC's sexual harassment policy.

In an employment discrimination case, the plaintiff must first produce sufficient evidence to establish a prima facie case. This may be done by showing that the plaintiff (1) was discharged, (2) was qualified for the position, (3) was within that protected class at the time of discharge and (4) was replaced by someone outside of the protected class.

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[1]Morgan's original petition also asserts federal and state constitutional claims. Those claims were dismissed, however, in an order filed on February 8, 1996.

St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2747 (1993) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)); see also *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 958 (5th Cir. 1993) (noting that the burden-shifting test set forth in *St. Mary's* is controlling in the summary judgment context). In order to establish a prima facie case where the discharge allegedly was based on the employee's violation of the employer's rules, "the plaintiff must first demonstrate by a preponderance of the evidence either that he did not violate the rule or that, if he did, white employees who engaged in similar acts were not punished similarly." *Green v. Armstrong Rubber Co.*, 612 F.2d 967, 968 (5th Cir.) (citing *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1254-55 (5th Cir. 1977)), *cert denied*, 449 U.S. 879 (1980). Once the plaintiff

demonstrates a prima facie case, a rebuttable presumption arises that the employer engaged in discrimination. *See St. Mary's*, 113 S.Ct. at 2747 (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The burden of production then shifts to the employer to produce a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* Once the employer meets this burden, the presumption created by the plaintiff's demonstration of a prima facie case is rebutted, and the plaintiff, who always retains the burden of persuasion, must demonstrate that the employer's proffered reason was not the true reascn for the adverse employment decision, but rather was merely a pretext for unlawful discrimination. *Id.* To demonstrate pretext, the plaintiff must show "*both* that the reason was false, *and* that

discrimination was the real reason." *Id.* at 2752 (emphasis in original).

After review of the evidence submitted by the parties in the light most favorable to Morgan, the Court finds that Morgan has demonstrated a prima facie case. The parties agree that Morgan has met the first three elements of the prima facie case, in that he has shown that he was discharged, that he was qualified for the position, and that he is a member of a protected class. TUEC asserts, however, that Morgan has failed in his prima facie showing because he has not demonstrated that white employees who engaged in similar acts were not punished as severely as Morgan. While the Court agrees with TUEC that the only comparator who engaged in conduct as egregious as the conduct with which Morgan was accused was also discharged, TUEC has skipped the first prong of this last element--namely,

that a plaintiff satisfies his burden if he demonstrates a genuine issue of fact as to whether he violated the work rule in question. *See Green*, 612 F.2d at 698. After review of the evidence, the Court believes that Morgan has presented sufficient evidence from which the trier of fact could find that he did not violate the policy in the first place, such that he has satisfied his initial burden of demonstrating a prima facie case.

Thus, the burden of production shifts to TUEC to demonstrate a legitimate, nondiscriminatory reason for Morgan's discharge. TUEC meets this burden by presenting admissible evidence of an explanation that would be legally sufficient to justify a judgment on its behalf. *See St. Mary's*, 113 S.Ct. at 2747; *Guthrie v. Tifco Indus.*, 941 F.2d 374, 376 (5th Cir. 1991), *cert. denied*,

112 S.Ct. 1267 (1992). TUEC has presented legally sufficient evidence demonstrating that Morgan actually did engage in a violation of its sexual harassment policy, which violation was sufficiently offensive to warrant immediate discharge. TUEC therefore has satisfied its burden.

As a result, Morgan must demonstrate that TUEC's proffered reason is merely a pretext for racial discrimination. After careful review of the evidence in the light most favorable to Morgan, the Court finds that he has failed to carry this burden. Morgan has wholly failed to demonstrate that the persons at TUEC responsible for making the decision to terminate him actually did not believe his accusers or that the sexual harassment complaint was not the real reason for the discharge:

When an employer discharges an

> employee for the reason that he violated the employer's sexual harassment policy by harassing a fellow employee, the pertinent inquiry is whether the decisionmakers believed at the time of the discharge that the employee was guilty of harassment and, if so, whether this belief was the reason for the discharge. The validity or invalidity of the initial complaint is not the central issue, because the ultimate falseness of the complaint proves nothing about the employer, only the complaining employee. *Waggoner v. City of Garland*, 987 F.2d 1160, 1165 (5th Cir. 1993). . . . [T]he inquiry is limited to whether or not [the employer] believed, in good faith, the allegations against [the plaintiff] and whether the decision to discharge [the plaintiff] was based upon that belief.

Johnson v. J.C. Penney, Co., Inc., 876 F.Supp. 135, 139 (N.D. Tex. 1995). Morgan has failed to present any evidence tending to show that TUEC's decisionmakers did not, at the time the termination decision was made, have a good faith belief that the allegations against Morgan were true or that the

termination decision was actually based upon his race.

Morgan has cited various remarks while he was employed by TUEC that he apparently believes indicate racial discrimination.[2] "To rise above the level of a stray remark and constitute direct evidence of discrimination, a remark must; (1) be made by the decision maker or one whose recommendation is sought by the decision maker; (2) be

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[2]Morgan indicates in his deposition that an unidentified person at TUEC called one of the black engineers "Buckwheat," and that the blacks at the plant frequently had to put up with those types of comments. Additionally, Morgan testified that one of his former supervisors, Steve Schroeder, indicated that the would vote for Adolf Hitler if he were running for office. Furthermore, Morgan testified that Schroeder, who knew that Morgan's wife, Barbara, is white, often concocted stories about a girl with bad morals named Barbara, which Morgan took to be a comment on his wife. Morgan was removed from Schroeder's supervision several months prior to Morgan's termination.

related to the specific employment decision challenged; and (3) be made close in time to the decision." *E.E.O.C. v. MCI Telecommunications Corp.*, 820 F.Supp. 300, 309 (S.D.Tex. 1993) (citing *Turner v. North Am. Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992); see also *Guthrie*, 941 F.2d at 379 (holding that when discriminatory comments are "vague and remote in time and administrative hierarchy, they are no more than 'stray remarks,' which are insufficient to establish discrimination."), *cert. denied*, 112 S.Ct. 1267 (1992). Morgan has failed to demonstrate when the allegedly discriminatory comments were made, nor does he show that they were related to the decision to terminate him in any way. Furthermore, Morgan has failed to show that these remarks were made by one of the decisionmakers or a person upon whom the decisionmakers

relied in making their decision to terminate Morgan. Indeed, the only person Morgan specifically identifies as having made what he believes to be racially discriminatory comments is his former supervisor, Steve Schroeder, and the evidence is clear that Schroeder was not involved in the decision to terminate Morgan, nor is there any evidence indicating that his input was solicited by the decisionmakers.

The only person involved in the termination decision about whose motives Morgan has presented testimony is Horace Riley, who was the manager of the TUEC plant where Morgan worked and, as such, was one step above Morgan's supervisor in the chain of command. Morgan testified that one day when Morgan's wife came to the plant, Riley was insistent upon meeting her and that when he did, he said nothing and just exhibited an "I want to

see who you are' attitude." (Oral deposition of Martin F. Morgan at 124) Morgan apparently assumed this meant that Riley did not like the fact that Morgan's wife was white. Morgan's assumption, however, is insufficient to constitute evidence of racial discrimination. Morgan has presented no evidence, other than his own subjective beliefs, to support this conclusion. *Cf. E.E.O.C. v. Exxon Shipping Co.*, 745 F.2d 967, 976 (5th Cir. 1984) ("pretext cannot be established by mere 'conclusory statements' of a plaintiff who feels he has been discriminated against.").

Morgan further testified that Riley was tired of TUEC's employees making complaints about discriminatory remarks made by their coemployees. In 1988, four years prior to his termination, Morgan made such a complaint to Riley about two coworkers, and as a result, Morgan

believes Riley wanted to terminate him. Again, Morgan has submitted little more than his own subjective beliefs in support of this conclusory assertion. Morgan points to a chronological summary of Morgan's employment allegedly "prepared by Texas Utilities in connection with the investigation of sexual harassment charges brought against Plaintiff in 1992, "(Pl.'s Resp. and Br. in Opposition to TUEC's Mot. for Summ. J. at 26), that included Morgan's complaint against the two coworkers as an entry on the summary. Morgan believes that this demonstrates that his 1988 complaint "was still very much in management's mind in 1992 when the decision was made to fire [him]." (Pl.'s Resp. and Br. in Opposition to TUEC's Mot. for Summ. J. at 25) The Court disagrees. Morgan has wholly failed to show that any of the decisionmakers were involved in preparing

the summary. Indeed, the Court has thoroughly reviewed each of the deposition excerpts submitted by Morgan in response to TUEC's motion, and it appears that none of the persons involved in the decision to terminate Morgan whose deposition Morgan presented to the Court had even seen the chronological summary prior to their deposition. *See* Oral Deposition of Scott Diermann at 38; Oral Deposition of Horace Riley at 23. The Court has found no other evidence, and Morgan has failed to point the Court to any such evidence, demonstrating that the summary was either prepared by one of the decisionmakers or that one of them relied upon or reviewed the summary prior to their decision to terminate Morgan. As a result, the Court is unpersuaded that this summary constitutes any evidence that Morgan was terminated on account of his race.

Morgan further testified that when Riley first spoke to him about the sexual harassment complaint against him, Riley said to Morgan "now the shoe is on the other foot . . . let's see how you like it . . . . " (Oral deposition of Martin F. Morgan at 125.) Morgan believes that this evidences the fact that his previous complaints were on Riley's mind when Morgan was terminated. Even so, however, the Court fails to see how this constitutes evidence that TUEC's reason for terminating Morgan was a pretext *for racial discrimination*. At most, this comment would support a conclusion that Riley was taking some perverse pleasure in seeing Morgan be the target of a discrimination-type complaint, not that he wanted to get rid of Morgan because of his race. Although Riley may have had an ulterior motive for voting to terminate Morgan's employment, Morgan cannot

prevail unless that ulterior motive was on account of Morgan's race.

It is, therefore, ORDERED that TUEC's Motion for Summary Judgment (document number 19-1) is hereby GRANTED.

SO ORDERED

SIGNED May 16, 1996.

s/Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARTIN F. MORGAN	§	
	§	
VS.	§	ACTION NO.
	§	4:94-CV-453-Y
	§	
TEXAS UTILITIES	§	
ELECTRIC COMPANY	§	

FINAL JUDGMENT

In accordance with the Memorandum Opinion and Order issued this same day and Federal Rule of Civil Procedure, 58,

It is hereby ORDERED, ADJUDGED AND DECREED that summary judgment is granted in favor of defendant Texas Utilities Electric Company, and all of plaintiff Martin F. Morgan's claims in the above-styled and numbered cause are hereby DISMISSED WITH PREJUDICE to the refiling same. All costs of court shall be borne by the party incurring same.

SO ORDERED.

SIGNED May 16, 1996.

s/Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 96-10723
Summary Calendar

MARTIN F. MORGAN,

Plaintiff-Appellant,

VERSUS

TEXAS UTILITIES ELECTRIC COMPANY,

Defendant-Appellee.

Appeal from the United States District Court For the Northern District of Texas
(4:94-CV-453-Y)

Before JONES, DeMOSS and PARKER, Circuit Judges.
PER CURIAM*

Plaintiff-Appellant, Martin F. Morgan appeals the summary judgment granted to Defendant-Appellee, Texas Utilities Electric Company in this

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

employment discrimination suit brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.* Specifically, Morgan, who is black, claims that TUEC discriminated against him on the basis of his race when it terminated his employment allegedly due to Morgan's violation of TUEC's sexual harassment policy. Having reviewed the briefs, the record and the applicable law, we conclude that the summary judgment should be affirmed for essentially the reasons relied on by the district court. *Morgan v. Texas Utilities Electric Co.*, 4:94-CV-453-Y (N.D.Tex. May 16, 1996).

AFFIRMED.

(FILED in 5th Circuit on December 26, 1996, as indicated by the stamp of the clerk)

Supreme Court, U.S.
FILED
APR 15 1997
OFFICE OF THE CLERK

(2)

No. 96-1471

In The

Supreme Court of the United States

October Term, 1996

MARTIN F. MORGAN,

Petitioner,

v.

TEXAS UTILITIES ELECTRIC COMPANY

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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April 16, 1997

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39 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that under the burden shifting test set out in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993) summary judgment should be granted in favor of Respondent because, as a matter of law, Petitioner failed to produce sufficient evidence to create an issue of fact as to his claim that Respondent's proffered non-discriminatory reason for Petitioner's discharge was a mere pretext for impermissible race discrimination?

LIST OF PARTIES

Petitioner

Martin F. Morgan

Respondent

Texas Utilities Electric Company

STATEMENT PURSUANT TO RULE 29.6

Respondent Texas Utilities Electric Company is a subsidiary of Texas Utilities Company. Texas Utilities Company is a publicly held company, having no parent company.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Statement Pursuant to Rule 29.6	iii
Table of Contents	iv
Table of Authorities	vi
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	2
Statement Of The Case	2
A. Introduction	2
B. Factual Background	2
C. Proceedings Before the District Court	8
D. Proceedings Before the Court of Appeals	9
Reasons For Denying The Writ	9
I. The District Court Correctly Applied the Burden Shifting Test Set Forth in *St. Mary's Honor Center v. Hicks* In Granting Summary Judgment for Respondent on Petitioner's Claim of Race Discrimination	10
A. Petitioner Failed to Prove a Prima Facie Case of Race Discrimination	12
1. Petitioner Violated Respondent's Sexual Harassment Policy	13
2. No Disparate Treatment Exists	14
B. TU Electric Had A Legitimate Non-Discriminatory Reason for Discharging Morgan	16

Page

C. Morgan Failed to Demonstrate That The Persons Responsible For His Discharge Did Not Believe That He Had Violated TU Electric's Sexual Harassment Policy And That His Race Was The Real Reason For His Discharge 17

1. The Proffered Reason for Morgan's Discharge Was Not False 18

2. Morgan's Subjective Beliefs of Discrimination On The Part of Horace Riley Are Insufficient To Constitute Evidence of Racial Discrimination 22

Conclusion 29

TABLE OF AUTHORITIES

CASES **Page(s)**

Anderson v. HCA Deer Park Hospital, 834 F.Supp. 183 (S.D. Tex. 1993) 12

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986) 13

Bienkowski v. American Airlines, Inc., 851 F.2d 1503 (5th Cir. 1988) 21

Bodenheimer v. PPG Industries, Inc., 5 F.3d 955 (5th Cir. 1993) 10

Cooper v. City of North Olmsted, 795 F.2d 1265 (6th Cir. 1986) 15

E.E.O.C. v. Clay Printing Co., 955 F.2d 936 (4th Cir. 1992) 25

E.E.O.C. v. Exxon Shipping Co., 745 F.2d 967 (5th Cir. 1984) 22

E.E.O.C. v. M.C.I. Telecommunications Corp., 820 F.Supp. 300 (S.D. Tex. 1993) 26

E.E.O.C. v. Texas Instruments, Inc. 100 F.3d 1173 (5th Cir. 1996) 24, 26

Elrod v. Sears, Roebuck & Co., 939 F.2d 1466 (11th Cir. 1991) 17, 20

Friedel v. City of Madison, 832 F.2d 965 (7th Cir. 1987) 21

Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309 (6th Cir. 1989) 25

Green v. Armstrong Rubber Co., 612 F.2d 967 (5th Cir.), *cert. denied*, 449 U.S. 879 (1980) 12

TABLE OF AUTHORITIES – Continued

CASES	Page(s)
Gunner v. Chevron U.S.A., 684 F.Supp. 916 (E.D. Tex. 1988)	12
Guthrie v. Tifco Industries, 941 F.2d 374 (5th Cir. 1991), *cert. denied*, 503 U.S. 908, 112 S.Ct. 1267, 117 L.Ed. 2d 495 (1992)	25, 26
Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461 (5th Cir.), *cert. denied*, 493 U.S. 842, 110 S.Ct. 129, 107 L.Ed. 2d 89 (1989)	26
Harris v. Plastics Mfg., Co., 617 F.2d 438 (5th Cir. 1980)	16
Haskell v. Kaman Corp., 743 F.2d 113 (2nd Cir. 1984)	25
Johnson v. J.C. Penney Company, Inc., 876 F.Supp. 135 (N.D. Tex. 1995)	13, 19, 20
Jones v. Gerwens, 874 F.2d 1534 (11th Cir. 1989)	15
Lee v. U.S. Postal Service, 882 F.Supp. 589 (E.D. Tex. 1995)	23,
Little v. Republic Ref. Co., 924 F.2d 93 (5th Cir. 1991)	15
Lo v. F.D.I.C., 846 F.Supp. 557 (S.D. Tex. 1994)	24, 26
McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973)	10, 12
Medina-Munoz v. R. J. Reynolds Tobacco Co., 896 F.2d 5 (1st Cir. 1990)	25
Merrick v. Farmers Ins. Group, 892 F.2d 1434 (9th Cir. 1990)	25
Montgomery v. Brookshire, 880 F.Supp. 483 (W.D. Tex. 1994)	21

TABLE OF AUTHORITIES – Continued

CASES	Page(s)
Mosley v. Atchison, Topeka & Santa Fe Ry. Co., 752 F.Supp. 229 (E.D. Tex. 1990)	12
Normand v. Research Institute of America, Inc., 927 F.2d 857 (5th Cir. 1991)	25
Patton v. United Parcel Service, Inc., 910 F.Supp. 1250 (S.D. Tex. 1995)	21, 22
Price Waterhouse v. Hopkins, 490 U.S. 228 109 S.Ct. 1775, 104 L.Ed. 2d 268 (1989)	24, 26
Singh v. Shoney's, Inc., 64 F.3d 217, 219 (5th Cir. 1995)	19
Smith v. Wal-Mart Stores, 891 F.2d 1177, 1180 (5th Cir. 1990)	15
St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993)	i, 10, 11, 12, 17, 18
Tate v. Weyerhaeuser, 723 F.2d 598 (8th Cir.1983), *cert. denied*, 469 U.S. 847 (1984)	16
Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed. 2d 207, 101 S.Ct. 1089 (1981)	11, 17
Turner v. North American Rubber, Inc., 979 F.2d 55 (5th Cir. 1992)	26
Turner v. Texas Instruments, Inc. 555 F.2d 1251 (5th Cir. 1977)	12
U.S. Postal Service Bd. of Gov. v. Aikens, 460 U.S. 711, 75 L.Ed. 2d 403, 103 S.Ct. 1478 (1983)	11
Waggoner v. City of Garland, Texas, 987 F.2d 1160 (5th Cir. 1993)	12, 17, 19, 25, 26
Walden v. Watkins, 95 F.3d 1160 (9th Cir. 1996)	25

TABLE OF AUTHORITIES – Continued

CASES **Page(s)**

STATUTES AND RULES

28 U.S.C. § 1254 1
28 U.S.C. § 2101(c) 1
42 U.S.C. § 2000e 2
Sup. Ct. R. 10 ..... 10, 18
Sup. Ct. R. 13.1 1

OPINIONS BELOW

On May 16, 1996, the U.S. District Court for the Northern District of Texas, Ft. Worth Division, issued its Memorandum Opinion and Order granting Texas Utilities Electric Company's ("TU Electric" or "Respondent") Motion for Summary Judgment.[1] A related final judgment dismissing Petitioner's claims was entered that same day.[2]

The Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. That court affirmed the district court's order granting summary judgment in favor of TU Electric, per curiam, by order dated December 26, 1996.[3]

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on December 26, 1996. The petition for writ of *certiorari* was filed on March 14, 1997.

The petition for writ of *certiorari* was filed within 90 days after the entry of the court of appeals' decision, as required by 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1. As an appeal from a final judgment or order of the court of appeals, this Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1994).

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[1] Pet. App. A. All references to "Pet. App." refer to the Appendix contained in Petitioner's Brief.

[2] Pet. App. A-17.

[3] Pet. App. A-19.

STATUTES INVOLVED

The statutory provision at issue is § 703 of Title VII of the Civil Rights Act of 1964, 78 Stat 255, 42 U.S.C. § 2000e-2(a)(1). 42 U.S.C. § 2000e-2(a)(1) states:

> **(a) Employer practices**
>
> It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

STATEMENT OF THE CASE

A. Introduction.

This is a race discrimination case brought by Martin F. Morgan ("Morgan"or "Petitioner") after he was discharged from his employment with TU Electric for violating it's Sexual Harassment Policy. Morgan brought this suit alleging that he was discharged due to his race, black, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e ("Title VII").

B. Factual Background.

TU Electric generally agrees with Petitioner's factual background set forth in his Statement of the Case. There are certain omissions or misstatements, however, which may be material to this Court's determination.

Morgan began working for TU Electric in 1980 as an Engineering Technologist and at the time of his discharge in 1992, had risen to the position of Senior Engineering Analyst.[4] In October 1992, Horace Riley, Morgan's Manager, was notified that a female contract security guard, Bernadette Herridge, had complained that Morgan was sexually harassing her.[5] TU Electric's Sexual Harassment Policy and Positive Discipline Policy expressly states that sexual harassment will not be tolerated, may result in discipline and, if the violation is serious enough, may result in termination.[6] Due to TU Electric's commitment to provide a harassment-free and productive work environment, its managers and supervisors are expected to take complaints of sexual harassment seriously and to conduct a thorough investigation into such complaints.[7] Accordingly, upon learning of the complaint, Mr. Riley informed Morgan's immediate supervisor, Scott Diermann, of the sexual harassment allegations against Morgan, and in accordance with TU Electric's company policy requested that Mr. Diermann conduct an investigation into the complaint.[8] Mr. Diermann was assisted in his investigation by Sandy Borchelt, TU Electric's Equal Employment Opportunity and Affirmative Action Program Supervisor, Judy

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[4] Rec. 179-183.

[5] Rec. 171.

[6] Rec. 148.

[7] Rec. 148, 152, 171-172, 436.

[8] Rec. 148-149, 158-159, 165, 172.

Hudson, Senior Personnel Representative, and Jim Stockton, Corporate Security Officer.[9]

Mr. Diermann testified in his deposition that during the course of his investigation he discovered that during the two months prior to Ms. Herridge bringing the complaint, Morgan had subjected her to the following inappropriate conduct: (1) repeatedly telling Ms. Herridge that he wouldn't mind fooling around with someone he knew and liked; (2) stating to Ms. Herridge that he and his wife were separating and asking if she would go out with him; (3) informing Ms. Herridge on numerous occasions, despite her protests and attempts to change the subject, that he and his wife were not having sexual relations (*i.e.*, that his wife "hadn't been giving him any"); (4) asking Ms. Herridge out to dinner on approximately 8-9 different occasions; (5) asking to see Ms. Herridge's hand and take her picture; (6) repeatedly requesting that Ms. Herridge give him her phone number; and (7) requesting that Ms. Herridge give him a kiss.

During the course of the investigation, Mr. Diermann also learned that Morgan had sexually harassed another female employee with whom he had previously worked, Vicky Depoy.[10] Ms. Depoy described several incidents of inappropriate conduct by Morgan, including exposing himself to Ms. Depoy and asking her to perform oral sex.[11]

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[9] Rec. 148-149, 158-159, 165, 172.

[10] Rec. 166.

[11] Rec. 150, 160. Recognizing the seriousness of Ms. Depoy's allegations, Ms. Hudson and Mr. Stockton specifically inquired as to why she had not reported this incident at the time it occurred. Ms. Depoy explained to them that at the time the incident occurred

During the investigation, both Mr. Diermann and Mr. Stockton met with Morgan separately on at least two different occasions each to discuss the allegations against him and to obtain his side of the story.[12] Although Morgan denied the allegations, both Mr. Stockton and Mr. Diermann found Morgan's responses to be inconsistent with statements given by not only the two female complainants, but also Morgan's co-workers.[13] In fact, statements taken from co-workers substantiated or lent credibility to both women's statements.[14] Furthermore, the two female complainants did not work with Morgan during the same time period and there was absolutely no evidence found during the investigation which indicated that they knew each other or would have any reason to fabricate the allegations.[15]

Based on the information gathered during the investigation, the members of the investigative team[16] determined that

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she was younger and unsure of how to handle the situation, she was not a real good employee, her immediate supervisor was not pleased with her performance, and she was concerned that he would not believe her or support her. *Id.* Feeling that she was on shaky ground at work, and having already requested a transfer to a different company location, Ms. Depoy was hoping just to leave and forget the whole thing. Rec. 151, 160.

[12] Rec. 161, 166.

[13] Rec. 161, 166.

[14] Rec. 161, 166.

[15] Rec. 167.

[16] References to the "investigative team" shall refer to Scott Diermann, Sandy Borchelt, Judy Hudson and Jim Stockton. Rec. 148-149, 158-159, 165, 172.

Morgan had violated the Company's Sexual Harassment Policy.[17] They reported their investigative findings and conclusion to Morgan's manager, Horace Riley.[18] A consensus decision was reached by Ed Platt[19], Sandy Borchelt, Judy Hudson, Mr. Riley and Mr. Diermann, with advice from legal counsel, that Morgan should be terminated for violating TU Electric's policy against sexual harassment.[20] On October 28, 1992, Mr. Diermann and Mr. Riley informed Morgan that his employment with TU Electric was terminated, effective immediately, for his inappropriate conduct in violation of TU Electric's Sexual Harassment Policy.[21] Morgan's race played no role in the decision to discharge him.[22]

Subsequent to his termination, Morgan appealed his termination through TU Electric's internal Employee Problem Resolution process.[23] The Employee Problem Resolution Policy is an effective and confidential method for employees who are not covered by a labor agreement to resolve work related problems.[24] A Problem Resolution Review Committee comprised of three Texas Utilities Company System Vice

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[17] Rec. 151-152, 161, 167-168.

[18] Rec. 161, 167-168.

[19] Mr. Platt was the manager to whom Mr. Riley reported. Rec. 172.

[20] Rec. 151-152, 168, 172.

[21] Rec. 168, 173.

[22] Rec. 152, 168, 173.

[23] Rec. 152.

[24] Rec. 153.

Presidents was appointed to review the termination decision to ensure it was consistent with company policy.[25] None of the individuals appointed to the committee were from Morgan's organization within the company, nor had they been involved in the investigation or the decision to terminate Morgan.[26] During the Employee Problem Resolution Review, the Review Committee independently interviewed Morgan, the complainants and the individuals who investigated the complaints. The Review Committee determined that Morgan had been properly discharged for a very serious offense of sexual harassment, which was clearly in violation of TU Electric's Sexual Harassment Policy.[27]

Petitioner's statement of facts mischaracterizes his work atmosphere by representing that during his employment racist remarks were made by various TU Electric supervisors.[28] The district court correctly pointed out, however, that Morgan identified only one former supervisor who made what Morgan believed to be racially discriminatory comments.[29] That particular supervisor was not involved in the investigation into the complaints against Morgan or the decision to terminate his employment.[30]

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[25] Rec. 153.

[26] Rec. 153.

[27] Rec. 153.

[28] Petitioner's Brief 7.

[29] Pet. App. A-11.

[30] Pet. App. A-11.

C. Proceedings Before the District Court.

On May 26, 1995, TU Electric moved for summary judgment on the grounds that Morgan failed to raise a genuine issue of fact as to his claim that he was discriminated against by TU Electric in violation of Title VII.[31] Morgan responded that a genuine issue of fact existed for four primary reasons.[32] *First*, he did not sexually harass the female complainants and, thus, did not violate TU Electric's Sexual Harassment Policy. *Second*, white males charged with sexual harassment were treated more leniently. *Third*, TU Electric had failed to produce sufficient evidence of a legitimate, non-discriminatory reason for Morgan's termination. *Fourth*, statements made by Morgan's supervisors and former supervisors created an issue of fact as to whether TU Electric's explanation for Morgan's discharge was a pretext and the true reason was racial discrimination. On May 16, 1996, the United States District Court for the Northern District of Texas, Fort Worth Division, granted TU Electric's motion for summary judgment.[33]

The district court ruled (1) that Morgan demonstrated a prima facie case of race discrimination because Morgan "presented sufficient evidence from which a trier of fact could find that he did not violate the policy in the first place";[34] (2) that TU Electric established a legitimate, non-discriminatory reason for Morgan's discharge by presenting sufficient evidence "demonstrating that Morgan actually did

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[31] Rec. 105-229.

[32] Rec. 234-655.

[33] Pet. App. A.

[34] Pet. App. A-6.

engage in a violation of its sexual harassment policy, which violation was sufficiently offensive to warrant immediate discharge";[35] and (3) that Morgan "wholly failed to demonstrate that the persons at [TU Electric] responsible for making the decision to terminate him actually did not believe his accusers or that the sexual harassment complaint was not the real reason for his discharge," but rather that the real reason was his race.[36]

D. Proceedings Before the Court of Appeals.

Morgan appealed the district court's ruling to the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"). On December 26, 1996, the Fifth Circuit affirmed the district courts ruling, per curiam, in an unpublished opinion.[37]

The Fifth Circuit failed to provide a detailed opinion as to the grounds on which it affirmed the district court's ruling.[38] Rather, the court merely stated that the summary judgment should be affirmed "for essentially the reasons relied on by the district court."[39]

REASONS FOR DENYING THE WRIT

The district court and the court of appeals properly held that in viewing the evidence in the light most favorable to Petitioner, Petitioner failed to demonstrate that Respondent's

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[35] Pet. App. A-7.

[36] Pet. App. A-7, 8, 9.

[37] Pet. App. A-19.

[38] Pet. App. A-19, 20.

[39] Pet. App. A-20.

preferred reason for his termination was merely a pretext for racial discrimination. Accordingly, Petitioner's petition for writ of *certiorari* should be denied.

Even if Petitioner's contention that issues of fact exist as to pretext had some merit, this Court should nevertheless deny *certiorari*. Petitioner does not contend that this case is worthy of *certiorari* under the criteria set forth in Supreme Court Rule 10. Pursuant to Rule 10, a petition for a writ of *certiorari* will be granted only for "compelling reasons," such as a conflict among the United States Court of Appeals or an important unresolved federal question. Rather, Petitioner contends that the district court and the court of appeals erred by resolving certain issues of fact in favor of Respondent in granting summary judgment. *Certiorari* is reserved for cases which are of consequence to other litigants in other situations. Supreme Court Rule 10 expressly provides that writ is "rarely granted when the error asserted consists of erroneous factual findings or the misapplication of a properly stated rule of law."

I. THE DISTRICT COURT CORRECTLY APPLIED THE BURDEN SHIFTING TEST SET FORTH IN *ST. MARY'S HONOR CENTER V. HICKS* IN GRANTING SUMMARY JUDGMENT FOR RESPONDENT ON PETITIONER'S CLAIM OF RACE DISCRIMINATION.

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993), this Court set forth the three-step burden shifting test to be used in analyzing a plaintiff's claim in a Title VII race discrimination case. 509 U.S. at 526, *citing, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). *See also Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 958 (5th Cir. 1993) (holding that the

burden-shifting test set out in *St. Mary's* is controlling as to what a plaintiff must do to avoid summary judgment). Pursuant to that test, the plaintiff must establish a prima facie case of racial discrimination, which, in turn, gives rise to a rebuttable presumption that the defendant employer unlawfully discriminated against the plaintiff. *St. Mary's Honor Center v. Hicks*, 509 U.S. at 506, *citing, Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 67 L.Ed. 2d 207, 101 S.Ct. 1089 (1981). Once the plaintiff establishes a prima facie case, the defendant bears the burden of producing evidence that its employment decision was based on a legitimate, non-discriminatory reason. *St. Mary's Honor Center*, 509 U.S. at 508-09 (by producing evidence, whether ultimately persuasive or not, of non-discriminatory reasons, petitioners sustained their burden of production). If the defendant articulates a legitimate, non-discriminatory reason for its actions, the burden then shifts back to the plaintiff to prove that the defendant intentionally discriminated against the plaintiff on the basis of race and that reasons proffered by the defendant are not its true reasons and were merely a pretext for discrimination. *St. Mary's Honor Center*, 509 U.S. at 515-17, *citing, U.S. Postal Service Bd. of Gov. v. Aikens*, 460 U.S. 711, 715, 75 L.Ed. 2d 403, 103 S.Ct. 1478 (1983). As this Court has emphasized, although the burden of production shifts between the parties, the burden of persuasion remains at all times with the plaintiff. *St. Mary's*, 509 U.S. at 509, *citing, Burdine*, 450 U.S. at 253. The district court properly applied this burden shifting test in reaching its decision that summary judgment in favor of Respondent is proper in this case.

A. Petitioner Failed to Prove a Prima Facie Case of Race Discrimination.

In the landmark case of *McDonnell Douglas*, this Court outlined the framework for establishing a prima facie case in Title VII cases. *McDonnell Douglas*, 411 U.S. at 802. Typically, a plaintiff establishes a prima facie case by demonstrating that: (1) he was discharged; (2) he was qualified for the job from which he was discharged; (3) he was within a protected class at the time of his discharge; and (4) he was replaced by a person outside the protected class. *Id. See also St. Mary's*, 509 U.S. at 506; *Waggoner v. City of Garland, Texas*, 987 F.2d 1160, 1163 (5th Cir. 1993); *Anderson v. HCA Deer Park Hospital*, 834 F.Supp. 183 (S.D. Tex. 1993). In Title VII cases where the discharge allegedly occurred as a result of the plaintiff's violation of the defendant employer's work rules, the Fifth Circuit has recognized that to establish a prima facie case the plaintiff must show either that (1) he did not violate the work rule in question, or (2) if he did, white employees who engaged in similar acts were not punished similarly.[40] *See Green v. Armstrong Rubber Co.*, 612 F.2d 967, 968 (5th Cir.), *cert. denied*, 449 U.S. 879 (1980); *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1254-55 (5th Cir. 1977); *Mosley v. Atchison, Topeka & Santa Fe Ry. Co.*, 752 F.Supp. 229, 231 (E.D. Tex. 1990); *Gunner v. Chevron U.S.A.*, 684 F.Supp. 916, 920 (E.D. Tex. 1988). Although the district court held that Morgan established a prima facie case of discrimination, TU Electric asserts that the evidence before the Court does not support such a finding and that writ of *certiorari* should be denied on the basis that Morgan failed to establish a prima facie case of race discrimination.

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[40] Pet. App. A-3.

1. Petitioner Violated Respondent's Sexual Harassment Policy.

In the factual background, TU Electric sets forth a detailed description of the specific acts of inappropriate conduct on the part of Morgan. Specifically, the evidence presented demonstrates that over a two-month period of time, Morgan repeatedly engaged in several acts of misconduct, including stating to Ms. Herridge that he and his wife were not having sexual relations and asking Ms. Herridge if she would go out on a date with him, requesting Ms. Herridge's telephone number, repeatedly telling her that he wouldn't mind "fooling around" with someone he knew and liked, and requesting that Ms. Herridge give him a kiss.[41] In addition, the summary judgment evidence demonstrates that prior to the incidents involving Ms. Herridge, Morgan had followed another female employee into the ladies restroom, exposed himself, and asked her to perform oral sex.[42] Furthermore, both Mr. Diermann and Mr. Stockton offered testimony that the statements taken by co-workers supported the allegations against Morgan. To the contrary, the only evidence presented by Morgan to dispute TU Electric's investigatory findings are his own self-serving statements in his affidavit denying such conduct.

Morgan failed to produce more than a mere scintilla of evidence that he did not violate TU Electric's Sexual Harassment Policy. *See Johnson v. J.C. Penney Co*, 876 F.Supp. 135, 138 (N.D. Tex. 1995), *citing, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (the existence of a mere scintilla of evi-

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[41] Rec. 164-165.

[42] Rec. 150-151, 160.

dence will not suffice to defeat a properly supported summary judgment). Accordingly, unless Morgan can establish that he was subject to disparate treatment, he has failed to establish a prima facie case of race discrimination.

2. No Disparate Treatment Exists.

In sexual harassment situations, in particular, the surrounding facts and circumstances are rarely identical in nature.[43] It is impossible to establish an exact criteria regarding levels of discipline for inappropriate behavior.[44] TU Electric, however, has attempted to handle sexual harassment situations as consistently as possible through counsel with its Employee Relations Department and the EEO Department.[45] In determining whether or not termination is warranted, management has traditionally made a decision based on the severity of the incident, along with consideration of any other related or mitigating factors.[46] In this particular case, the management involved made a decision that under the particular facts and circumstances involved, Morgan's termination was the appropriate discipline.[47]

Morgan asserted to both the district court and court of appeals that white male employees of TU Electric who engaged in similar acts of sexual harassment were not punished

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[43] Rec. 148-149.

[44] Rec. 148-149.

[45] Rec. 148-149.

[46] Rec. 148-149.

[47] Rec. 152, 168, 173.

similarly or, in other words, were treated more leniently.[48] The courts correctly found that Morgan failed to show he was subject to disparate treatment.[49]

TU Electric presented evidence of six other males (one black and five white) who had been disciplined or discharged by the Company for either sexual harassment or arguing with a female employee.[50] To establish a claim of disparate treatment, Morgan must show that TU Electric gave preferential treatment to a non-minority employee under "nearly identical" circumstances. *See Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991); *Smith v. Wal-Mart Stores*, 891 F.2d 1177, 1180 (5th Cir. 1990). There is absolutely no evidence in the record that any employee of the Company who engaged in similar acts of inappropriate conduct was given less-severe punishment than Morgan.[51] In fact, the one white male com-

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[48] Rec. 253-254.

[49] Pet. App. A-5.

[50] Rec 154.

[51] Rec. 155. Even assuming for argument purposes that Morgan appeared to have been disciplined more severely than similarly-situated white males, this is not necessarily determinative that race discrimination exists. In each of the six disciplinary situations referenced above, different supervisors and managers were involved in the decision as to the appropriate discipline. (Rec. 154). Disciplinary measures taken by different supervisors are not necessarily comparable for determining discriminatory discipline under Title VII. *Jones v. Gerwens*, 874 F.2d 1534, 1541 (11th Cir. 1989). *See also, Cooper v. City of North Olmsted*, 795 F.2d 1265, 1271 (6th Cir. 1986)("Although a change in managers is not a defense to claims of race or sex discrimination, it can suggest a basis other than race or sex for the difference in treatment received by two employees.");

parator whose conduct was the most similar to Morgan's was discharged.[52] In cases such as this, where the employer has presented evidence of a specific instance in which a white employee who engaged in similar conduct was disciplined in precisely the same manner as the plaintiff, no prima facie evidence of discrimination exists. *See e.g., Harris v. Plastics Mfg., Co.*, 617 F.2d 438, 440 (5th Cir. 1980).

In summary, TU Electric asserts that Morgan failed to produce summary judgment evidence to support his contention that he did not violate TU Electric's Sexual Harassment Policy or that he was subject to disparate treatment. Because Morgan failed to establish a prima facie case of race discrimination, summary judgment against Morgan on his Title VII claim is proper and, thus, Morgan's writ of *certiorari* should be denied.

B. TU Electric Had a Legitimate Non-Discriminatory Reason for Discharging Morgan.

Assuming, *arguendo*, that Morgan met his burden of establishing a prima facie case of race discrimination, TU Electric articulated a legitimate, non-discriminatory reason for Morgan's discharge -- he violated TU Electric's Sexual Har-

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Tate v. Weyerhaeuser, 723 F.2d 598, 605 (8th Cir. 1983), *cert. denied*, 469 U.S. 847 (1984) (where plaintiffs charged with falsifying worksheets compared the treatment of several white employees who allegedly falsified documents, court found the misconduct and the respective disciplinary measures taken "distinguishable," because none of the supervisory personnel involved in the discipline of plaintiffs participated in decisions regarding white employees).

[52] Rec. 154-155, 253.

assment Policy.[53] A discharge justified on the basis of sexual harassment allegations is, on its face, a legitimate non-discriminatory reason.[54] *See Waggoner v. City of Garland*, 987 F.2d 1160, 1164 (5th Cir. 1993). Furthermore, if TU Electric fails to discipline an employee it believes to be guilty of sexual harassment, it "runs a serious risk of incurring Title VII liability to those employees harassed." *See, Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). Accordingly, TU Electric met its burden of producing a legitimate non-discriminatory reason for Morgan's discharge.

C. Morgan Failed to Demonstrate That The Persons Responsible For His Discharge Did Not Believe That He Had Violated TU Electric's Sexual Harassment Policy And That His Race Was The Real Reason For His Discharge.

Because TU Electric met its burden of producing a legitimate, non-discriminatory reason for Morgan's discharge, Morgan must show that TU Electric's proffered reason is a mere pretext for unlawful race discrimination. *St. Mary's*, 509 U.S. 507-508. Petitioner invites this Court to review this case on the grounds that the district court erred in applying *St. Mary's Honor Center's* burden shifting test by usurping the

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[53] Under the test set forth in *McDonnell Douglas*, and clarified in *St. Mary's*, it is clear that TU Electric's burden is not one of persuasion, but rather of production. *St. Mary's*, 509 U.S. at 509; *Burdine*, 450 U.S. at 253. TU Electric is not required to persuade the Court that it was actually motivated by the proffered reason, as the ultimate burden of persuasion remains at all times with Morgan. *St. Mary's*, 509 U.S. at 509.

[54] Rec. 211.

role of the jury and making impermissible fact findings as to the existence of pretext in favor of TU Electric.[55] In *St. Mary's Honor Center*, this Court held that to show pretext, a plaintiff must show not only that the proffered reason given by the defendant is false, but also that race discrimination was the real reason. *St. Mary's*, 509 U.S. 507-508. The district court and court of appeals correctly held that in viewing the evidence in the light most favorable to Morgan's claim, he failed to tender factual evidence which would enable a jury to reasonably conclude that TU Electric's justification for his discharge is a mere pretext for unlawful race discrimination. Further, this Court's review of this case on these grounds would have no significant impact on other litigants in similar cases and would not satisfy the "compelling reasons" standard set forth in Supreme Court Rule 10.

Morgan presents this Court with two primary arguments to show that an issue of fact exists as to pretext. *First*, he did not violate TU Electric's work rule prohibiting sexual harassment. *Second*, Horace Riley[56] was motivated to discharge Morgan from his employment because of race.[57]

1. The Proffered Reason For Morgan's Discharge Was Not False.

Morgan contends that he did not violate TU Electric's work rules and policies prohibiting sexual harassment and

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[55] Petitioner's Brief 10, 17.

[56] Mr. Riley was the manager at the plant where Morgan worked and, as such, was one step above Morgan's supervisor, Scott Diermann, in the chain of command. Pet. App. A-11.

[57] Petitioner's Brief 12, 14-16.

that the claims of sexual harassment brought by Ms. Herridge and Ms. Depoy are false.[58] The Fifth Circuit has held that in a case such as this, "the focus of [the court's] inquiry is not whether the initial petition contained falsehoods or was racially motivated, but whether the [employer] reasonably believed the allegation and acted on it in good faith". *See Singh v. Shoney's, Inc.*, 64 F.3d 217, 219 (5th Cir. 1995); *Waggoner v. City of Garland*, 987 F.2d 1160, 1165 (5th Cir. 1993); *Johnson v. J.C. Penney Co.*, 876 F.Supp. at 139. The district court held that Morgan "wholly failed to demonstrate that the persons at [TU Electric] responsible for making the decision to terminate him actually did not believe his accusers or that the sexual harassment complaint was not the real reason for his discharge."[59] The district court, relying on the reasoning in *Johnson v. J.C. Penney, Co.*, 876 F.Supp. at 139, stated:

> When an employer discharges an employee for the reason that he violated the employer's sexual harassment policy by harassing a fellow employee, the pertinent inquiry is whether the decision makers believed at the time of the discharge that the employee was guilty of harassment and, if so, whether this belief was the reason for the discharge. The validity or invalidity of the initial complaint is not the central issues, because the ultimate falseness of the complaint proves nothing about the employer, only the complaining employee. *Waggoner v. City of Garland*, 987 F.2d 1160, 1165 (5th Cir. 1993). . . . [T]he inquiry is limited to whether or not [the employer] be-

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[58] Petitioner's Brief 12; Rec. 237-239, 253.

[59] Pet. App. A-7.

> lieved, in good faith, the allegations against [the plaintiff] and whether the decision to discharge [the plaintiff] was based upon that belief.[60]

In this regard, the court in *Johnson* stated that it could assume for purposes of it's decision that "the complaining employees . . . were lying through their teeth," and that the only relevant question for it to decide was whether the employer believed the complaining employees and in, good faith, relied on the complaints. *Id., citing, Elrod v. Sears, Roebuck & Co.,* 939 F.2d at 1470.

The summary judgment evidence unequivocally supports the district court's finding that TU Electric believed Ms. Herridge and Ms. Depoy and relied, in good faith, on their complaints. When the initial complaint of sexual harassment was brought against Morgan, Mr. Riley assigned Morgan's immediate supervisor, Mr. Diermann, to conduct an investigation into the complaint.[61] Morgan testified during his deposition that he believed Mr. Diermann was "a fair and decent person" and that he had never discriminated against Morgan while he was under his supervision.[62] Mr. Stockton, Ms. Borchelt and Ms. Hudson assisted Mr. Diermann in the investigation.[63] These three individuals worked at TU Electric's Dallas Headquarters in the Personnel and Corporate Security Departments and were completely independent and autonomous from the management over Morgan. *Id.*

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[60] Pet. App. A-7, 8, *citing, Johnson,* 876 F.Supp. at 139.

[61] Rec. 164, 171. 212.

[62] Rec. 182-183, 212.

[63] Rec. 148-149, 158-159, 165, 172.

Mr. Diermann and these three individuals were the persons responsible for conducting the entire investigation, including interviewing all persons involved.[64] Based on their investigatory findings, they concluded that Morgan violated the Company's Sexual Harassment Policy and reported their findings to Mr. Riley.[65] To show that TU Electric did not have a good faith belief that Morgan had violated the Company's Sexual Harassment Policy, Morgan would have to present summary judgment evidence to show that Scott Diermann, Jim Stockton, Sandy Borchelt and Judy Hudson interviewed Ms. Herridge, Ms. Depoy and their co-workers and believed the allegations against Morgan were false, but, nevertheless,

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[64] Rec. 147-149, 158-159, 165, 172.

[65] Rec. 161, 167-168. Texas employment law is clear that Morgan must do more than "cast doubt on the reasonableness" of TU Electric's actions; otherwise, "the law would be converted to a "just cause" provision for the protected class of employees, an effect that Congress clearly did not intend." *Montgomery v. Brookshire*, 880 F.Supp. 483, 487 (W.D. Tex. 1994), *citing*, *Bienkowski*, 851 F.2d at 1508. Furthermore, the "employment discrimination laws are not intended to be a vehicle for judicial second-guessing of business decisions, nor . . . to transform the court into personnel managers." *Patton*, 910 F.Supp. at 1263, *citing*, *Bienkowski v. American Airlines, Inc.* 851 F.2d 1503, 1507-08 (5th Cir. 1988) ("while the matter could have been handled differently, it is not the court's place to second-guess management's business decisions or to serve as a self-appointed, corporate personnel manager"). Although Morgan may not agree with the investigative team's findings and the actions taken by the Company, there can be no liability unless the actions were discriminatory in violation of Title VII. *Patton*, 910 F.Supp. at 1267 ("Title VII does not make an employer liable for simply erroneous or arbitrary decisions."), *citing*, *Friedel v. City of Madison*, 832 F.2d 965, 973 (7th Cir. 1987).

conspired to report to Horace Riley that they believed the allegations to be true so that Morgan would ultimately be fired because he was black. Morgan has not produced one shred of evidence that the four individuals responsible for the investigation did not believe the allegations against him, or had any motive to discriminate against him based on his race.

2. Morgan's Subjective Beliefs of Discrimination On The Part of Horace Riley Are Insufficient To Constitute Evidence Of Racial Discrimination.

Five individuals were involved in the initial decision to discharge Morgan.[66] Of these five individuals, Horace Riley was the only individual whose motives were questioned by Morgan.[67] Morgan submits that Mr. Riley resented the fact that Morgan's wife was white.[68] The district court properly recognized that this assertion is based merely on Morgan's own assumption and speculation and is not supported by any summary judgment evidence.[69] Morgan's own subjective belief of race discrimination, however genuine, cannot serve as the basis for judicial relief. *See Patton v. United Parcel Service*, 910 F.Supp. at 1250, 1263, 1267 (S.D. Tex. 1995) ("Even in cases where elusive concepts such as motive or intent are at issue," summary judgment is appropriate if the non-moving party "rests merely upon conclusory allegations, improbable inferences, and unsupported speculation."); *E.E.O.C. v. Exxon*

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[66] Rec. 151-152, 168, 172

[67] Pet. App. A-12.

[68] Petitioner's Brief 16.

[69] Pet. App. A-12.

Shipping Co., 745 F.2d 967, 976 (5th Cir. 1984) ("pretext cannot be established by mere 'conclusory statements' of a plaintiff who feels he has been discriminated against"); *Lee v. U.S. Postal Service*, 882 F.Supp. 589, 596 (E.D. Tex. 1995) ("courts cannot allow subjective belief and speculation to be the basis for judicial relief, particularly when, as here, an adequate, non-discriminatory reason is presented for the employer's actions."). The district court properly held that Morgan's subjective beliefs fail to raise a genuine issue of fact as to pretext.[70]

Morgan also alleges that in 1988, he brought a race discrimination complaint against two white male co-workers who had made disparaging remarks to him and that Mr. Riley resented Morgan bringing this complaint.[71] Morgan asserts that this resentment was Mr. Riley's motivation for terminating him from his employment with TU Electric.[72] There is no evidence in the record, however, to support Morgan's subjective belief that Mr. Riley was irritated or held some type of grudge over the complaint brought by Morgan in 1988. In fact, the evidence shows that in accordance with Company policy, Mr. Riley, in his capacity as manager, took the exact same steps in dealing with Mr. Morgan's complaint as he did with Ms. Herridge's and Ms. Depoy's.[73] Mr. Riley listened to Morgan's complaint, conducted an investigation

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[70] Pet. App. A-12.

[71] Petitioner's Brief 14-17.

[72] Petitioner's Brief 14-17.

[73] Rec. 174, 182

into the complaint, and ultimately disciplined the two co-workers for making racial remarks to Morgan.[74]

In an attempt to establish that Mr. Riley resented his prior discrimination complaint, Morgan alleges that when Mr. Riley first spoke to him about the sexual harassment complaint brought by Ms. Herridge, Mr. Riley stated: "now the shoe is on the other foot, let's see how you like it."[75] Morgan asserts that this one alleged statement supports an inference that Mr. Riley terminated him from his employment with TU Electric because Morgan had made a prior race discrimination complaint.[76] This Court and the Fifth Circuit have consistently recognized, however, that stray remarks, standing alone, are insufficient evident of unlawful discrimination necessary to avoid summary judgment. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-252, 109 S.Ct. 1775, 1791, 104 L.Ed. 2d 268 (1989) ("[s]tray remarks in the workplace . . . cannot justify requiring that the employer prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements made by decisionmakers unrelated to the decisional process itself suffice to satisfy the plaintiff's burden in this regard."). *See also E.E.O.C. v. Texas Instruments, Inc.* 100 F.3d 1173, 1181 (5th Cir. 1996); *Lo v. F.D.I.C.*, 846 F.Supp. 557,

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[74] Rec. 174, 482. One employee was demoted from his supervisory position and the other was eventually reassigned to another Company location. *Id.*

[75] Petitioner's Brief 15-16.

[76] Petitioner's Brief 14-17.

564 (S.D. Tex. 1994).[77] A stray remark is a remark which is isolated (i.e., not accompanied by other remarks similar in nature) or not accompanied by other evidence of discriminatory animus. *Cf. Normand v. Research Institute of America, Inc.*, 927 F.2d 857, 864 n.3 (5th Cir. 1991). *See also Waggoner*, 987 F.2d 1166 ("mere stray remarks, with nothing more, are insufficient to establish a claim of age discrimination"); *Guthrie v. Tifco Industries*, 941 F.2d 374, 378-79 (5th Cir. 1991), *cert. denied*, 503 U.S. 908, 112 S.Ct. 1267, 117 L.Ed. 2d 495 (1992) (holding that such "statements are too vague to be accepted as direct evidence" of discrimination).[78] There is no evidence that Mr. Riley made other similar remarks or that Mr. Riley had ever made any negative or derogatory comments to Morgan concerning his prior race discrimination claim. In addition, the record is devoid of any other evidence that TU Electric's asserted justification for Morgan's discharge is pretextual.

In order for a statement or comment to be probative of an employer's discriminatory intent, the comment "must be

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[77] Other circuits similarly discount evidence of stray remarks. *See e.g. E.E.O.C. v. Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434 (9th Cir. 1990); *Medina Munoz v. R. J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1990); *Haskell v. Kaman Corp.*, 743 F.2d 113 (2nd Cir. 1984).

[78] *See also Walden v. Watkins*, 95 F.3d 1160 (9th Cir. 1996) (holding that single remark by supervisor that "as a woman you need to sit back and bide your time" was insufficient evidence to survive summary judgment); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314-16 (6th Cir. 1989) (finding that "a single, isolated discriminatory comment" by supervisor who said he "needed younger blood" was insufficient to withstand summary judgment).

direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions" that an impermissible factor (*e.g.*, age, race, or sex) was considered in the "decision" to terminate the employee." *Texas Instruments*, 100 F.3d at 1181. *See e.g. Waggoner*, 987 F.2d at 1166 (statement that a younger person could do faster work and reference to plaintiff as an "old fart" insufficient to establish age discrimination); *Guthrie v. Tifco Indus.*, 941 F.2d 374, 378-79 (5th Cir. 1991), *cert. denied*, 503 U.S. 908, 112 S.Ct 1267, 117 L.Ed. 2d 495 (1992) (comment that the new president needed to "surround himself with people his age" was "insufficient to establish discrimination"); *Lo v. F.D.I.C.*, 846 F.Supp. at 564 (comment with respect to a trading position that "all Chinese guys like to trade," is alone insufficient to support a claim of race and national origin discrimination).[79] *See also E.E.O.C. v. M.C.I. Telecommunications Corp.*, 820 F. Supp. 300, 310 (S.D. Tex. 1993), *citing, Price Waterhouse v. Hopkins*, 490 U.S. at 251 (the "plaintiff must show that the employer actually relied on the illegitimate factor in making its decision"). The district court properly held that this isolated comment by Mr. Riley did not constitute direct evidence that Morgan's race was the motiva-

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[79] Although stray remarks made by a decisionmaker in the termination decision may be probative as to discriminatory intent, this alone is insufficient to show pretext. *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1466 (5th Cir.), *cert. denied*, 493 U.S. 842, 110 S.Ct. 129, 107 L.Ed. 2d 89 (1989). The plaintiff must still produce evidence that the comment was directly and unambiguously related to the employment decision and that race was a factor in the decision to terminate the employee. *Texas Instruments*, 100 F.3d at 1181; *Waggoner*, 987 F.2d at 1166; *Turner v. North American Rubber, Inc.* 979 F.2d 55, 59 (5th Cir. 1992); *Guthrie*, 941 F.2d at 379.

tion behind the decision to terminate him.[80] The district court stated:

> [T]he Court fails to see how this constitutes evidence that TUEC's reason for terminating Morgan was a pretext for racial discrimination. At most, this comment would support a conclusion that Mr. Riley was taking some perverse pleasure in seeing Morgan be the target of a discrimination type complaint, not that he wanted to get rid of Morgan because of his race. Although Riley may have had an ulterior motive for voting to terminate Morgan's employment, Morgan cannot prevail unless that ulterior motive was an account of Morgan's race.[81]

Respondent submits that it is also significant to note once the investigatory findings were reported to Mr. Riley, he did not make the decision to terminate Morgan alone.[82] Rather, in accordance with Company policy, a consensus decision was reached by Ed Platt, Judy Hudson, Sandy Borchelt, Scott Diermann and Mr. Riley, with advice from legal counsel, that discharge was appropriate under the particular circumstances involved.[83] Furthermore, Morgan produced no evidence of a discriminatory motive on the part of the three individuals appointed to review the appropriateness of the termination decision through the Employee Problem Resolution Process. There is absolutely no evidence in the record that these individuals had any racial motivation to

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[80] Pet. App. A-15.

[81] Pet. App. A-15.

[82] Rec. 151-152, 168, 172.

[83] Rec. 151-152, 168, 172.

discharge Morgan or to concur with a discharge decision they did not believe to be appropriate and consistent with TU Electric's company policies.

In summary, the decision to terminate Morgan was a consensus decision among approximately five individuals who, based on the results of an extensive investigation, determined Morgan had violated the Company's Sexual Harassment Policy.[84] This decision was then reviewed by three other individuals to ensure its fairness and appropriateness. Contrary to Morgan's assertions, the district court did not draw inferences favorable to TU Electric from conflicting testimony. The district court merely refused to consider, and properly so, Morgan's speculations and subjective belief that he was fired because of race discrimination.

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[84] Rec. 151-152, 168, 172.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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